Council meeting. Council Member Hansen withdrew his second, and the motion **died** for lack of a second.
City Attorney Schwabauer stated he was generally clear on the direction Council wanted to take and asked for specific direction regarding building maintenance. Council suggested a form of security, such as a rehabilitation bond, be researched.

The matter was continued to the November 1, 2006 City Council meeting.

F. COMMENTS BY THE PUBLIC ON NON-AGENDA ITEMS

- Woody Alspaugh spoke in opposition to the potential development of the greenbelt area between Stockton and Lodi. He provided a description of transfer development rights and requested that the City remain apprised of related issues.
- Chuck Easterling spoke in favor of stronger law enforcement efforts to control vagrancy within the City. Mr. Easterling spoke specifically of his concerns regarding vagrancy in the downtown area on Sacramento Street between Pine and Elm Streets and suggested the matter be reviewed by the City Council at a regular meeting. Council Member Hansen stated the aggressive solicitor ordinance is coming before the Council shortly and the ordinance may have some overlap, but it focuses on a different issue. Mayor Hitchcock suggested the ordinance come back to Council in the near future.
- David Johnson spoke in opposition to a recent decision by SPARC to overturn conditions of his use permit. Mr. Johnson stated he addressed the City Council last month on the same issue and due to a lack of a response, is requesting the matter be put on a shirtsleeve session or Council agenda before November 7, 2006. Mayor Hitchcock stated staff is working on the matter and Mr. Johnson's patience is appreciated.

G. COMMENTS BY CITY COUNCIL MEMBERS ON NON-AGENDA ITEMS

- Mayor Pro Tempore Johnson urged the public to attend the Candidate's Forum at Hutchins Street Square and complimented the Fire Department in its handling of the fire on Pine Street.
- Mayor Hitchcock stated she attended the annual arts open house, which was a great success.

H. COMMENTS BY THE CITY MANAGER ON NON-AGENDA ITEMS

- In regard to the vagrancy concerns, City Manager King stated the aggressive solicitation ordinance and the loitering ordinance will be coming before the City Council shortly. Mr. King stated the Police Department is continuing to look at loitering in the downtown area and may be addressing the matter by way of an anti-camping ordinance.

  In regard to David Johnson's comments, City Manager King stated the matter is on the looking ahead schedule and is prioritized with additional citizen requests. Mr. King stated it is difficult to process and manage the numerous issues that arise, but staff is trying to address the matter in an expeditious manner.

  City Manager King introduced new City Clerk Randi Johl.

I. PUBLIC HEARINGS

I-1 Notice thereof having been published according to law, an affidavit of which publication is on file in the office of the City Clerk, Mayor Hitchcock called for the public hearing to consider adopting resolution levying annual (2007) assessment for Downtown Lodi Business Improvement Area No. 1 and confirming the Downtown Lodi Business Partnership 2006-07 Annual Report (as approved by Council on October 4, 2006).
Mayor Hitchcock reviewed the mechanics of the hearing procedure requesting business owners in the affected area protesting the proposed levy to speak first for the ease of recording the formal protest, followed by general public comments on the matter.

City Manager King stated the item is a follow-up action item to a work plan submitted by the Downtown Lodi Business Partnership (DLBP) and the process requires the City Council to conduct a public hearing. Mr. King stated the City Council must open the public

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Land Conservation Tools

Fact Sheet #5

Transfer of Development Rights

Transfer of Development Rights (TDR) programs use market forces to simultaneously promote conservation in high value natural, agricultural, and open space areas while encouraging smart growth in developed and developing sections of a community. Successful TDR programs have been in place throughout the country since 1980, and have protected tens of thousands of acres of farmland and open space.

Description

In a TDR program, a community identifies an area within its boundaries which it would like to see protected from development (the sending zone) and another area where the community desires more urban style development (the receiving zone). Landowners in the sending zone are allocated a number of development credits which can be sold to developers, speculators, or the community itself. In return for selling their development credits, the landowner in the sending zone agrees to place a permanent conservation easement on his or her land. Meanwhile, the purchaser of the development credits can apply them to develop at a higher density than otherwise allowed on property within the receiving zone.

Considerations

TDR programs have the advantage of using free market mechanisms to create the funding needed to protect valuable farmland, natural areas, and other open space. However, many people find TDR programs complex and administratively challenging, requiring the local unit of government to make a strong commitment to administering a potentially complicated program and educating its citizens and potential developers. TDR programs must be combined with strong comprehensive planning and local controls in order to be successful.

Where It Is Working

Montgomery County, Maryland, near fast growing Washington, D.C., established its TDR program in 1980. By the end of fiscal year 1997, the TDR program had protected 39,180 acres (out of a total sending area of 89,000 acres) under protective easement. Prior to 1980, the county lost an average of 3,500 acres of farmland per year to development. In the first decade following the establishment of the TDR program, the county lost a total of 3,000 acres to development, a drop of approximately 92 percent.

The New Jersey Pinelands, an environmentally unique and sensitive area of about one million acres, was targeted for protection through The New Jersey Pinelands Protection Act of 1979. The Pinelands Commission, the regional land use authority, established a TDR program in 1980 which had protected 5,300 acres by 1991.

Field Guide to Transfer of Development Rights (TDRs)

By Michele Cordero, Information Specialist

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The ABCs of TDRs

Issues in Implementing

The quest for controlled growth requires creative planning and foresight. Transfer development rights (TDR) is just one too used in the battle to contain sprawl . TDF is the exchange of zoning privileges from areas with low population needs, such as farmland, to areas of high population needs, such as downtown areas. These

TDR Programs

TDR Case Studies

Books, eBooks & Other Resources

transfers allow for the preservation of op spaces and historic landmarks, while giving urban areas a chance to expand and experience continued growth. This page includes information on what TDRs are and how they work, issues in creatin a successful TDR program, case studies and more.

WHAT'S THE PASSWORD?

Woody Alspaugh (209) 462-7669

Field Guide to Transfer of Development Rights (TDRs)

By Michele Cordero, Information Specialist

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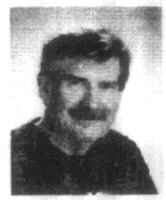
WHAT'S THE PASSWORD?

Every moving living creature THINKS. Observe a fly. When it lands, watch its eyes. Move your hand and it flies away. Now when it lands again, it will watch you. If you don't move, it will. If you move slightly it will stop and crouch down. Make a move towards it and it will spring up backwards against your on-coming motion.* Now man is supposedly to have the ability to reason. Man has been given the knowledge of what poisons the Air, water and ground. They (we) have the opportunity to CHOOSE between good and bad. However, greed for money and power along whith ignorance and stupidity rules the day. Also, we have not been able to overcome our ancestral animal instinct to kill. Therefore, we still have wars.

History



Therefore, because we have the opportunity to reason, we are able to learn from the past and correct/ change things for the better. Unfortunately, because of the above, sometimes we turn a "blind eye" to the obvious and continue to not only make the same mistakes, but increase the harm/danger. For example, asbestos and Lead were found to be harmful to people, however smoke (from cigarettes), also harmful, is still allowed for reasons stated above

Now, as early man became "civilized" they started to group together, for practical purposes. Most of the main cities were built next to water ways, either near the Oceans or by large rivers. The reason being that it made it easier to transport trade items. The First city that I will pick will be Los Angeles, located in one of the world's most fertile valleys and a vessel safe harbor. So when the ships from Espana stumbled upon it, they named it the "city of the Angels" because it was so perfect. But man, as stated above, wasn't satisfied to keep it just as a harbor, instead of keeping it pure farmland, they built factories and huge business offices, decimating (ruining) the valley.

.(Read "Two Years Before The Mast" by Richard Dana.) Next; Stockton, Ca., located in the center of the San Joaquin Valley. Stockton also became a port for shallow bottom boats, paddle-wheels and barges, to transport goods for the California "Gold Rush". Later, the San Joaquin River was drudged out to allow ocean going vessels to visit Stockton. (Since things have changed over the years, bigger ships and the "channel having to constantly being drudged out, this small port has grown out its needs). As stated above,The same thing applies to this "one horse", backward, hillbilly town, along whith corrupt city officials whith GREEDY builder's, referred to as DEVELOPERS, . Instead of trying to persevere the farmland, they are building on "prime"farmland instead of concentrating on "infill,(lot's of vacant spaces) and rebuilding (the true meaning of "development") of down treaded neighborhoods, also, it seems, the old fashion way of building up instead of Sprawling out. (Because farmland is so cheap). NEXT:

So, these "people" keep trying to cir-
convent these issues by having "con" men drawing up plans to

build on this land justifying it by having "Public Meeting's" to which very few people are aware and less attending the" hearings" The latest bring the "Agricultural Mitigation Fee Nexus Study

Stockton is one of the most fertile agriculture areas in the entire world. It has several types of soil, whith most of it being very fertile, consisting of some of the different types- sand, adobe and peat dirt, (being in the adjacent Delta). Maters of fact, some areas, until recently, were never "farmed".

"Agricultural Mitigation Fee Nexus Study":
To make a long story short, this is a proposed method of assessing a "fee" (money) to build on "prime" farmland, which includes 99% of Stockton, within about a 7 mile radius, in order to purchase (buy) other "farmland". This is just an excuse to build on the existing land. The City, (being proposed by the "con" men, hired by the city), has a map that shows, (a new made up word) "Sphere of Influence", in which it virtually accomplishes the whole era surrounding the city. If this is not bad enough, a big percent of the money will go to administration. Also, no one knows what "land will qualify for the "Nexus".

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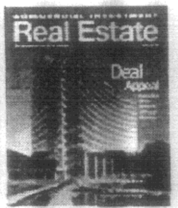

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Preserving Property

Transfer of development rights saves natural and historic sites.
By Kenneth R. Costello

PRINT

Transfer of development rights programs allow property owners to buy and sell development rights without actually exchanging any land. The basic TDR concept is to compensate landowners who give up potential development rights in environmentally sensitive areas or preservation districts as designated by communities. The goal is to direct development away from sensitive lands, known as "sending" areas, toward more suitable areas, called "receiving" areas. The forms of compensation may be money from a developer or development credits from the county.

TDRs have been used to preserve historic buildings, agricultural land, forest land, and open space. For example, in 1978, the city of New York allowed Penn Central Transportation Co. to transfer unused development rights for Grand Central Station to the company's other properties to preserve the historic landmark. In 1997, development rights also were transferred near Lake Tahoe, Nev., from lands that carried runoff water into the Lake Tahoe watershed to other designated areas.

TDRs in Action

More recently TDRs have become an issue in Collier County, Fla., where, in an effort to preserve wetlands and a natural habitat, the county has designated certain areas as rural fringe areas and rural land stewardship areas. The first developer to take advantage of the program is the Barron Collier Co., which is developing the new town of Ave Maria in Collier County. The land where Ave Maria is to be located has been designated a RLSA/TDR area. To get county approval for the project, which will have a density of 11,000 residential units and 1.2 million square feet of commercial space, the Barron Collier Co. placed conservation easements on more than 16,000 acres, according to Blake Gable, Ave Maria's project manager.

Collier County's RLSA program issues credits depending on the environmental sensitivity of the lands to be preserved. For example, eight credits are needed to develop 1 acre of land, Gable says. The county allots the maximum number of credits to the most sensitive lands, so developers are motivated to preserve the most environmentally valuable land. The credits are the county's inducement to the private sector to partner with them to conserve the wetlands. Since Ave Maria is the first project to utilize the TDR program, the process was especially complicated and time-consuming, taking about three years to complete. But the results are worth it: The efforts will preserve 90 percent of the uplands and wetlands as well as 91 percent of wildlife habitat within the RLSA, according to WilsonMiller, a Naples, Fla., engineering and planning company.

The Value of TDRs

More than 20 states have implemented TDR programs, allowing property owners in historically or environmentally sensitive areas around the country to sell the development rights, deed the property to the county, or develop property themselves in receiving areas with existing infrastructure.

One of TDRs' main benefits is that they allow environmentally sensitive land to be voluntarily set aside with no cost to the public, says Dolly Roberts, spokeswoman for Ave Maria Development. "This benefits both the community and the landowner," Roberts says. After the development right is sold or exchanged for credits, the land may be reassessed and taxed at a lower rate, should an owner wish to retain title rather than deed it to the county.

Purchasing a TDR, or receiving a credit, allows a developer to build or increase the density of a project. Additional units, known as bonus density TDRs, may be purchased from a landowner if the owner has met certain criteria specified by the county. These bonus densities are granted for restoring the property being preserved and/or creating a conservation easement over the property.

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All landowners in the sending areas have the opportunity to create bonus TDRs and then negotiate the price with a developer. The creation of bonus density TDRs allows the land to be restored, placed in a land mitigation bank, deeded to the county, or have a conservation easement placed upon it. Each of these actions preserves natural habitat and wetlands while at the same time directing development away from these areas.

Implementing the Program

Several basic elements need to be in place for a successful TDR program. These include the existence of a valid public purpose, a clear designation of the sending and receiving areas, and the recording of the development rights as a conservation easement, says John B. Bredin, JD, in an American Planning Association report.

From a financial standpoint, there must be development pressure in an area. Developers must not be allowed extra density via variances or other methods outside the TDR program; otherwise there will be little incentive for them to purchase TDRs. There also must be a comprehensive plan and proper zoning if the program is to achieve the stated objectives of preserving designated areas. Zoning in the area must protect against variances. For example, the comprehensive plan should prevent developers from obtaining variances to increase density. If they are able to do this they do not need to purchase TDRs, therefore undermining the program.

TDRs currently are valued by the market, meaning the price the seller is willing to accept and the buyer is willing to pay. Some planners suggest the county establish, fund, and operate a TDR bank, buying from landowners and selling to land developers. This would establish a predictable value for the TDR. While government agencies cannot force landholders to sell their land interests, TDR programs can be seen as mandatory in that a TDR must be purchased in order to develop a piece of land. Even though there is no law mandating the sale of a TDR, the zoning and master plan have the effect of forcing a purchase by developers.

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FACT SHEET

TRANSFER OF DEVELOPMENT RIGHTS

DESCRIPTION

Transfer of development rights programs allow landowners to transfer the right to develop one parcel of land to a different parcel of land. Generally, TDR programs are established by local zoning ordinances. In the context of farmland protection, TDR is used to shift development from agricultural areas to designated growth zones closer to municipal services. The parcel of land where the rights originate is called the "sending" parcel. When the rights are transferred from a sending parcel, the land is restricted with a permanent conservation easement. The parcel of land to which the rights are transferred is called the "receiving" parcel. Buying these rights generally allows the owner to build at a higher density than ordinarily permitted by the base zoning. TDR is known as transfer of development credits (TDC) in California and in some regions of New Jersey.

TDR programs are based on the concept that property owners have a bundle of different rights, including the right to use land, lease, sell and bequeath it, borrow money using it as security, construct buildings on it and mine it, subject to reasonable local land use regulations. Some or all of these rights can be transferred or sold to another person. When a landowner sells property, generally all the rights are transferred to the buyer. TDR programs enable landowners to separate and sell the right to develop land from their other property rights.

TDR is most suitable in places where large blocks of land remain in farm use. In communities with a fragmented agricultural land base, it is difficult to find a viable sending area. Jurisdictions also must be able to identify receiving areas that can accommodate the development to be transferred out of the farming area. The receiving areas must have the physical capacity to absorb new units, and residents of those areas must be willing to accept higher density development. Often, residents of potential receiving areas must be persuaded that the benefits of protecting farmland outweigh the costs of living in a more compact neighborhood.

TDR programs are distinct from purchase of agricultural conservation easement (PACE) programs because they involve the private market. Most TDR transactions are between private landowners and developers. Local governments generally do not have to raise taxes or borrow funds to implement TDR. A few jurisdictions have experimented with public purchase and "banking" of development rights. A TDR bank buys development rights with public funds and sells the rights to private landowners.

HISTORY

TDR is used predominantly by counties, towns and townships. The 1981 National Agricultural Lands Study reported that 12 jurisdictions had enacted TDR programs to protect farmland and open space, but very few of these programs had been implemented. In the 1980s and 1990s, many local governments adopted TDR ordinances. A survey in the spring of 2000 identified 50 jurisdictions with TDR ordinances on the books. Three programs had been revoked. Despite the widespread adoption of TDR, only fifteen programs have protected more than 100 acres of farmland and only eight programs have protected more than 1,000 acres of farmland. Twenty-two programs, or 44 percent, have not protected *any* agricultural land. Since 1980, Montgomery County, Maryland, has protected 40,583 acres using TDR, or 60 percent of the national total (67,707 acres).

FUNCTIONS & PURPOSES

TDR programs can be designed to accomplish multiple goals including farmland protection, conservation of environmentally sensitive areas and preservation of historic landmarks. In the context of farmland protection, TDR programs prevent non-agricultural development of farmland, reduce the market value of protected farms and provide farmland owners with liquid capital that can be used to enhance farm viability.

TDR programs also offer a potential solution to the political and legal problems that many communities face when they try to restrict devel-

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January 2001

TRANSFER OF DEVELOPMENT RIGHTS

For additional information on transfer of development rights and other farmland protection programs, the Farmland Information Center offers publications, an online library and technical assistance. The farmland information library is a searchable database of literature, abstracts, statutes, maps, legislative updates and other useful resources. It can be reached at http://www.farmlandinfo.org. For additional assistance on specific topics, call the technical assistance service at (800) 370-4879.

opment of farmland. Landowners often oppose agricultural protection zoning (APZ) and other land use regulations because they can reduce equity. APZ can benefit farmers by preventing urbanization, but it may also reduce the fair market value of their land. When downzoning is combined with a TDR program, however, landowners can retain their equity by selling development rights.

ISSUES TO ADDRESS

In developing a TDR program, planners must address a variety of technical issues. These issues include:

- Which agricultural areas should be protected?
- What type of transfers should be permitted?
- How should development rights be allocated?
- Where should development be transferred, and at what densities?
- Should the zoning in the sending area be changed to create more of an incentive for landowners to sell development rights?
- Should the zoning in the receiving area be changed to create more of an incentive for developers to buy development rights?
- Should the local government buy and sell development rights through a TDR bank?

One of the most difficult aspects of implementing TDR is developing the right mix of incentives. Farmers must have incentives to sell development rights instead of building lots. Developers must benefit from buying development rights instead of building houses according to the existing standards. Thus, local governments must predict the likely supply of and demand for development rights in the real estate market, which determines the price. TDR programs are sometimes created in conjunction with APZ: New construction is restricted in the agricultural zone, and farmers are compensated with the opportunity to sell development rights.

Because the issues are so complex, TDR programs are usually the result of a comprehensive planning process. Comprehensive planning helps a community envision its future and generally involves extensive public participation. The process of developing a community vision may help build understanding of TDR and support for farmland protection.

BENEFITS OF TDR

- TDR protects farmland permanently, while keeping it in private ownership.
- Participation in TDR programs is voluntary—landowners are never required to sell their development rights.
- TDR promotes orderly growth by concentrating development in areas with adequate public services.
- TDR programs allow landowners in agricultural protection zones to retain their equity without developing their land.
- TDR programs are market-driven—private parties pay to protect farmland, and more land is protected when development pressure is high.
- TDR programs can accomplish multiple goals, including farmland protection, protection of environmentally sensitive areas, the development of compact urban areas, the promotion of downtown commercial growth and the preservation of historic landmarks.

DRAWBACKS OF TDR

- TDR programs are technically complicated and require a significant investment of time and staff resources to implement.
- TDR is an unfamiliar concept. A lengthy and extensive public education campaign is generally required to explain TDR to citizens.
- The pace of transactions depends on the private market for development rights. If the real estate market is depressed, few rights will be sold, and little land will be protected.

Source: American Farmland Trust, *Saving American Farmland: What Works* (Northampton, MA 1997)

The Transfer of Development Rights

Joseph Stinson and Michael Murphy, 1996

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B. How TDR Works

1. Designating Sending Districts
2. Designating Receiving Districts
3. Establishing a Market for TDR Credits
4. Creating a TDR Program

C. Statutory Authority for TDR in New York

D. Judicial Responses to TDR

1. French Investing Co. v. City of New York.
2. Penn Central Transportation Co. v. City of New York
3. Other New York Caselaw.

E. Conclusion.

A. Introduction.

Municipalities are often faced with the challenge of trying simultaneously to promote development and the preservation of threatened natural or man-made resources.[1] One technique for lessening the friction between these seemingly incompatible objectives is called Transfer of Development Rights [hereinafter TDR]. This technique allows development to take place without sacrificing sensitive lands.[2]

Land use regulation is accomplished primarily through zoning, which is an exercise of the state=s police power. Traditional Euclidian zoning, which divides a municipality into districts and then regulates the type and amount of development to be allowed within each district, has been criticized for its inflexibility and cookie-cutter community design. Regulations within each district must apply uniformly, which historically has resulted in each lot in a district being entitled to the same amount of development as every other lot in that district.[3] This phenomenon tends to encourage development that encroaches upon the maximum amount of land with the least efficient use of resources.[4]

The alternative to such cookie-cutter development is to concentrate allowable development in certain areas within the community and to protect the remainder as open space or environmentally conserved land. TDR promotes compact development patterns because the development potential of protected areas is combined with the development potential of nonsensitive areas and those nonsensitive areas are then developed at a greater density than normally allowed. [5]

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B. How TDR Works

There are three basic elements to a TDR program: the sending district, the receiving district, and the TDR credits themselves.[6] The sending district consists of the area or properties sought to be protected from development or redevelopment. The receiving district is located where additional density can be accommodated with a minimum of adverse consequences. The *TDR credits are a legal* representation of the abstract development rights which will be severed from property in the sending district and grafted onto property in the receiving district. The TDR credits are traded in a free market, although a TDR bank may be established to facilitate *exchanges. When a TDR credit is purchased from a property owner* in the sending district, that property owner records a deed restriction prohibiting development on his property. The TDR credit can then be applied to property in the receiving district as a density bonus or other zoning incentive. The designation of sending and receiving districts, and the establishment of a market for the TDR credits involve numerous considerations and so each shall be discussed separately below.

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1. Designating Sending Districts

The location and scope of the sending district will be defined by the physical resource the community seeks to protect. The incentive to protect the property may be the cultural, ecological, or economic characteristics of the property. For example, the sending district may be agricultural land within a county, individual buildings that have been declared historic landmarks by a city, or ecologically sensitive land.[7]

When a sending district is designated, the zoning authority will reduce the degree of development to be permitted within that district by amending the zoning ordinance.[8] For example, to preserve its agricultural property, Montgomery County, Maryland, rezoned its agricultural district from 5 acre to 25 acre zoning.[9] As a result, the development potential of property within that district was reduced by approximately 80 percent. By restricting the amount of allowable development, the sending district is protected from the adverse effects of development and, at the same time, that development demand is encouraged to flourish elsewhere in the community.

Prior to the implementation of the TDR program, the future sending district may or may not have already undergone some degree of development. The area may be rural, partially developed, suburban or urban. The degree of existing development in the sending area is a significant consideration because it influences the expectations of property owners with regard to the market value of their property. Developable property in a crowded urban setting may be far more expensive than similar property in the countryside. This becomes an issue when down zoning in the sending area decreases the property value to the point where the property owners raise a compensable takings challenge.[10]

The size of the sending district may also contribute to the complexity of the TDR program. Especially in a home rule state such as New York, sending districts which encompass the jurisdictions of multiple zoning authorities are likely to prompt a great deal of legal and political turmoil. This phenomenon was evident in the formation of the Long Island Pine Barrens= TDR program.[11] There, a 52,500 acre sending district and a 47,500 acre receiving district crossed the jurisdictions of three towns, two villages, and the county. The controversy over where the district boundaries should be located was a hotly-contested issue even as the bill approving the program was being signed into law.[12]

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2. Designating Receiving Districts

Receiving districts are areas within which additional development will take place to compensate for the development now forbidden in the sending district. Accordingly, the receiving district should be selected based on its ability to absorb additional density without overtaxing the community=s infrastructure. The district should have adequate roads, water service, waste treatment and schools, or the capacity to develop such services to the extent necessary to accommodate the additional density. The zoning ordinance will be amended to allow TDR credits to be applied to properties within the receiving district. Those properties may then be developed at a greater density than the standard zoning allows.

Such a zoning amendment may or may not prove popular with property owners in the receiving district. Owners may object to the increase in development density itself, or, to the requirement that TDR credits be applied to a property before it is eligible for the increased density allotment. The first argument may be put forth by property owners who actually reside within the receiving district, and who associate an increase in development activity with increased congestion and a decrease in property values. Generally, the fear is that the TDR program will destroy the character of the neighborhood. This argument may be rebutted legally by pointing out that all property is subject to rezoning for the general welfare, and that no property owner has a vested right to a particular zoning classification in perpetuity.[13] Practically, it must be demonstrated that by encouraging and properly supporting development within the receiving district, property values there may actually increase and overall community tax rates will be lower than if the community develops under the blueprint of the current zoning ordinance.

Some property owners in the receiving district, actively seeking to develop their property, may argue that allowing additional density for the holders of TDR credits suggests that the existing density restrictions are arbitrary and therefore invalid. Since zoning regulations within a district are supposed to be uniform for each class of buildings throughout any district,[14] a lot owner who does not own TDR credits could argue that his property is just as suitable for additional density as property belonging to someone with TDR credits. But the uniformity requirement is met since all property owners within the district are permitted to participate in the TDR program if they choose to do so and since the TDR program is part of a comprehensive plan for the community. The community benefits contributed by a TDR purchaser are legally, if not politically, valid reasons to allow certain properties to be developed at greater densities.

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3. Establishing a Market for TDR Credits

The key to a successful TDR program is a healthy market for the TDR credits. This is true for two reasons. First, if the market is not active, TDR credits are not being sold, which means that deed restrictions on property in the sending district are not being recorded.[15] Second, in a more active market, owners of TDR credits are likely to receive a fair price. As credits increase in value, holders of credits will be eager to participate in the program as they perceive the value of their credits to be commensurate with the profits they have foregone by not developing their property. When the value of credits fall short of expectations, property owners in the sending district may contest the down zoning of their property as a taking. Property owners and developers are slow to place faith in TDR programs and as a result, TDR credits often remain undervalued. The biggest challenge therefore, to implementing a successful TDR program is inspiring participation and active trading in the TDR market.

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4. Creating a TDR Program

The first step in creating a TDR program is identifying the resource to be protected. Whether the goal is historic, ecological, or agricultural preservation, it is critical for those people who will be affected by the TDR program to understand the goal and to agree on the need to take action. If the community cannot agree on the necessity of a TDR program, they will not support it.[16] If the community agrees that wetlands, or farmland, or architectural treasures are critical resources that define the character of the community and contribute to the quality of life, the community is more likely to coalesce behind the TDR program and overcome the socio-political inertia that impedes the implementation of such an innovative program.[17] The ideal time for educating the community is as soon as the endangered resource is recognized as being worthy of protection. Bringing the community together to effect a plan for the future will encourage the best ideas to be put forth as early as possible in the process, and it will allow time to eliminate the weaknesses in plans that would not benefit the community. This community visioning will invest members of the community with a sense of involvement in the process and ownership of the program it produces. If property owners feel the TDR program is their program, they are more likely to become involved in the market.

In addition to clearly defining the goal of the preservation effort, the community must understand the theory behind the TDR program. Most people are comfortable with the concept of selling mineral rights separate from the surface rights of land. This concept can serve as a springboard for explaining how development rights can be severed from the ownership of property, and transferred to another location where they reattach to realty. The mechanism itself, the TDR credit, should be clearly defined in terms of the bonus density or zoning incentive it represents when applied in the receiving district.

The receiving district must be designed to encourage a market for TDR credits. Here, the principles of supply and demand come into play. The supply of TDR credits is determined according to the amount of developable property that exists in the sending district prior to the implementation of the TDR program. To insure that the credits have value, the demand for credits should exceed the supply. This means that the receiving district should be drawn so that it can accommodate more TDR credit transfers than the program will actually create. This will inspire competition for the credits which will increase their value.

Another important factor influencing the success of a TDR program is the degree of externalities that the program must accommodate. One such externality is the amount of development which has already taken place in the community. In the sending district, higher levels of existing development equate to greater expectations with regard to property values. Intense preexisting development in receiving areas will support the argument that further increases in density cannot be absorbed. Generally speaking, TDR programs are more easily implemented in areas that are less developed. Even so, a limited TDR program can be successful even in a metropolitan environment.[18]

Another externality to consider is the number of jurisdictions that will be involved in the program. Often the objects of preservation efforts in areas such as a watershed or a coastal zone, involve several political jurisdictions. Since a unified effort is required to adequately preserve the goal, municipalities, counties, and even state agencies may have to cooperate in the program. As the number and size of the jurisdictions involved in the preservation effort increases, the chances of achieving a consensus on the details of a TDR program may be diminished.

Existing zoning schemes should also be closely examined for their compatibility with a TDR program. If a community offers a wide variety of zoning incentive for various amenities, there will be little incentive for developers to participate in the TDR program. Developers will tend to seek out only those zoning incentives that the market will reward, and where given a choice, developers will acquire those incentive through the zoning technique that presents the least cost and difficulty. Accordingly, if a developer can fulfill the market potential by either clustering his development or through participating in the TDR program, he may avoid TDR for the relative certainty and simplicity of clustering. One final thought to keep in mind, developers tend to plan their acquisition of property for development projects well in advance. This means they can sit back and evaluate the potential of a TDR program before deciding to participate. The absence of developers from the TDR market in the initial phase of implementing the program may cause concern for other property owners who might participate in the program. To encourage participation in the program, the community may consider some degree of down zoning in the receiving districts which would stimulate demand for the additional density available through TDR credits.

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C. Statutory Authority for TDR in New York

The 1989 codification of TDR authority for New York municipalities [19] was an effort to encourage the use of TDR and to provide guidance for the development of TDR programs.[20] Although mandatory language is used in the amendments, they are in essence, advisory, as indicated by specific reference to the continued legitimacy of TDR programs erected under other authority [21] and by the inclusion of the following statement concluding each amendment: "Nothing in this section shall be construed to invalidate any provision for transfer of development rights *heretofore or* hereafter adopted by any local legislative body."[22] The Declaration of Legislative Intent explicitly states that the amendments are intended to "clarify an application of existing authority and to provide guidelines whereby any city, town or village may provide for transfer of development rights . . . ."[23]

The purpose of TDR under the amendments is clearly defined: "To protect the natural, scenic or agricultural qualities of open lands, to enhance sites and areas of special character or special historical, cultural, aesthetic or economic interest or value and to enable and encourage flexibility of design and careful management of land in recognition of land as a basic and valuable natural resource."[24] The traditional applications of TDR to landmark, open space, and environmental preservation fall easily within the above stated purposes.

The amendments go on to prescribe a methodology intended to preserve the declared purposes of the codification. The first requirement, as is the case with all zoning in New York State, is that the program be established in accordance with a comprehensive plan.[25] To meet this requirement the TDR amendments provide a litany of considerations including traffic congestion, fire and flood protection, open space, population density, adequate infrastructure, the character of the district, and even the accommodation of solar energy systems[26]should they become viable. Promoting the general health and welfare and encouraging the "best use" of land are pliant and adaptable considerations suggested by the amendments that can be offered to support any number of planned land uses.[27] In essence, municipal planners are required to give some consideration to the ramifications of implementing TDR, while preserving significant flexibility for establishing and prioritizing municipal goals.

Sending districts are limited to those which epitomize those values deemed worthy of protection under the purpose section of the TDR statutes.[28] They do not otherwise receive much attention in the legislation. There is no reference to "down zoning" in the receiving district or general proscription on development that typically characterizes a sending district.[29]

Receiving districts must be carefully scrutinized as to their capacity to absorb development transferred from the sending districts. Specific attention must be paid to the effects of increased development on available resources, environmental quality, transportation, waste disposal and fire protection.

Transferring development rights may tend to alter the tax base for schools and special districts.[30] The amendments do not bar changes in the tax burden, but require that the changes not be unreasonable.[31] Presumably, any test for reasonableness would weigh the benefit of the protection sought under the TDR program against the heighten tax burden of affected property owners. The more compelling the need for preserving a particular value, the more likely it will overcome objections to changes in the tax base.

The restrictive zoning that typically accompanies TDR will lower the property value of land in the sending district.[32] Accordingly, reassessments are required on property from which development rights have been transferred properly reflect the devaluation.[33]

Additional concerns are addressed in the amendments by requiring that TDR programs have specified procedures, that the sending and receiving districts be mapped with specificity, that conservation easements are recorded on the deeds of property from which development rights have been transferred, and that the usual notice requirements for zoning amendments be followed.[34]

The amendments make some effort to coordinate preservation efforts under local TDR programs with environmental regulation efforts of other levels of government.[35] However the initial decision on a proposed TDR program's compatibility with the preservation efforts of other levels of government lies with the local legislative body.[36] A generic environmental impact statement [hereinafter GEIS] is required prior to the implementation of TDR.[37] Individual TDR transactions are subject to review for their effect on the environment only to the extent that review under the GEIS was inadequate.[38] The amendments require the municipality to amend its environmental impact statement if "there are material changes in circumstances."[39]

Finally, in an attempt to create a market for TDR credits, the amendments authorize municipalities to establish TDR banks.[40]

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D. Judicial Responses to TDR

There are two seminal New York cases dealing with TDR. The first, *French Investing Co. v. City of New York*,[41] invalidated a TDR transfer mandated by the City of New York. The second, *Penn Central v. New York*,[42] stated in dicta that the availability of a TDR transfer was a factor that mitigated the financial impact of a landmark preservation program. *French* analyzed the practical value of a TDR scheme in the context of a substantive due process challenge while *Penn Central* raised a question as to the legitimacy of TDR credits as just compensation for an alleged taking. Other case law in New York deals primarily with the transfer of air rights and developer manipulation of zoning lot mergers to effect such transfers.

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1. French Investing Co. v. City of New York.

Tudor City was a residential complex in Manhattan that embraced two 15,000 square-foot parks.[43] When the owner of the parks announced his plans to build on them to the full extent permitted by the zoning ordinance, there was strong public reaction to the loss of open space.[44] The Board of Estimate approved the recommendation of the New York City Planning Commission to include the Tudor City Parks in a newly created Special Park District.[45] This change in zoning prohibited the park's owner from building on the parks, but permitted him to transfer their development rights to other property in Manhattan.

The New York Court of Appeals viewed this involuntary application of TDR as an unconstitutional exercise of the police power.[46] The zoning amendment immediately altered the property owner's right to develop the parks.[47] The owner's ability to transfer his development rights to another property was contingent however, on locating and purchasing a receiving property and receiving administrative acceptance to that specific transfer proposal, or finding a buyer willing to purchase those rights.[48] In the court's view, these contingencies rendered the value of the transferable development rights too uncertain in comparison with the value of the right to develop the parks prior to the zoning amendment.

[I]t is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action.[49]

The court, in the context of a total prohibition on development of the lots, found that the zoning ordinance was unreasonable and therefore constitutionally infirm because it frustrates the property owner in the use of his property . . . [it] destroys its economic value or all but a bare residue of its value.[50] From this analysis one must conclude that when a zoning regulation prohibits development in a sending zone and the market for TDR credits is speculative a valid challenge may lie..

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2. **Penn Central Transportation Co. v. City of New York..**[51]

This case shed some light on the legitimacy of TDR programs in new York. Here, plaintiffs applied for permission to construct a 50 story office tower above Grand Central Station in New York City.[52] The station however, had recently been designated an historical landmark, which meant that construction of the office tower would *require the approval of the Landmarks Preservation Commission*. [53] When the Commission vetoed the 50 story construction plans, Penn Central brought suit alleging that the Landmarks Preservation Law effected an unconstitutional taking of its property.[54] The United States Supreme Court rejected the takings claim, holding in essence, that a property owner is not guaranteed the most profitable use of his property,[55] that the Landmarks Preservation Law as *applied, did not interfere with plaintiff's* existing use of the property as a railroad station and concessionaire rental property, and that the plaintiffs did not show that all but a bare residue of development rights were taken by the law..[56] Plaintiffs were unable to meet their burden of establishing that the law denied them a reasonable return on their property.[57] The Landmark Preservation Law was upheld. [58]

Writing for the majority, Justice Brennan made reference to the availability of transferable development rights under Landmark Preservation Law and the city's zoning ordinance.[59] But because the Court had decided that no taking had occurred, it was not necessary to decide whether transferable development rights constituted just compensation.[60] Justice Brennan did acknowledge *that the TDR program mitigated the financial burden on the property* owner and that it should be taken into account in considering the impact of the regulation.[61] But he noted that these [TDR] rights may well not have constituted >just compensation= if a >taking' had occurred . . . .[62] Then Justice Rehnquist, in his dissent, opposed any scheme that sought to legitimize a taking by paying the owner anything less than a full and perfect equivalent for the property taken.[63] Even if Penn Central had been offered substantial amounts for its TDRs, Justice Rehnquist would subject such offers to judicial scrutiny to insure that they truly reflected the value of the property given up before endorsing TDR as just compensation.[64]

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3. Other New York Caselaw.

The remainder of the case law concerns the machinations of developers trying to qualify for a zoning lot merger under the New York City Zoning Ordinance so they can effect a transfer of air rights from one lot to the other. The courts have generally upheld strawman type transactions where a developer will lease a lot adjacent to property he owns in fee, transfer the air rights from the leased lot to increase the FAR allowance on his fee property, then relinquish the lease to the lessor.[65] The tenant of an office building is not a party in interest who can legally oppose a proposed zoning lot merger involving the building in which he is a tenant.[66] And the City cannot oppose a zoning lot merger on the ground that they require the *sending* lot to apply for a use variance.[67]

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E. Conclusion.

TDR is a cumbersome, but useful technique for accommodating preservation and development simultaneously. TDR is a tool for relieving some of the financial burden on property owners whose land has been legitimately down zoned. Community consensus on the value of the resource to be protected is critical as is the ability of the receiving zone to absorb the density transferred. A TDR program should be designed and incorporated into the overall zoning scheme in a manner that encourages active trading in the TDR market. TDR may be more effective at protecting valuable resources because the sending district can be defined to encompass the entire resource, as opposed to piecemeal protection efforts via incentive zoning, cluster zoning, or planned-unit development

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Footnotes

[1] While development and growth are elements contributing to the vitality of a community, undisciplined development may degrade the community=s quality of life. Ecologically sensitive properties, such as land overlying an aquifer or the drainage basin of a reservoir system, need to be protected from the impacts of development. Similarly, economically vulnerable properties, such as farmland or historical landmarks, need relief from the financial incentive to redevelop such properties for uses that provide a greater return on investment.

[2] *See, generally,* PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS. " 6.01-.06.

[3] This is a broad but useful generalization.

[4] As each lot within a community is developed, the need to further extend the community=s physical and service infrastructure may strain the community=s resources. New roads must be built and maintained, more police, fire fighters, and emergency medical technicians may be required, utility easements consume more land, and so forth.

[5] It is important to point out that TDR is a flexible concept. It may be thought of as a variation on the theme of incentive zoning. The difference is, where incentive zoning may create a density bonus out

of whole cloth to reward the developer=s provision of some amenity, TDR allows the developer to exceed normal density restrictions on one piece of property in exchange for permanently foregoing some degree of development on another piece of property. This technique may also be viewed as encompassing both the more formal TDR program to be described in this paper, as well as less structured programs that allow the transfer of air rights from one parcel to another. *See* ROHAN, supra note 2, ' 6.01 *et seq.*; David Alan Richards, *Downtown Growth Controls Through Development Rights Transfer*, 21 REAL PROP. & T. J. 435 (1986).

[6] *See* NORMAN WILLIAMS JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW '159.11 *et seq.*(1985).

[7] These examples are illustrated by Maryland=s Montgomery County agricultural preservation program, New York City=s landmark preservation program, and New Jersey=s Pinelands preservation program, all of which employ TDR.

[8] Down zoning the sending district alleviates the pressures of development in sensitive areas. The sale of TDR credits will mitigate some of the financial burden on property owners in the sending district who must now forego development on their property.

[9] *See* Richard J. Roddewig and Cheryl A. Inghram, *Transferable Development Rights Programs: TDRs and the Real Estate Market Place*, Planning Advisory Service Report No. 401, May 1987. This article provides an excellent comparison of eight TDR programs and their varying degrees of success.

[10] *See* Part D. *infra*.

[11] The Long Island Pine Barrens are a unique ecological and geological system which serve to filter the water entering a 15-trillion gallon underground aquifer. Environmental groups initiated litigation to control development in the Pine Barrens. Although the environmentalists eventually lost the suit, the litigation interrupted development in the pine barrens for seven years and prompted an intermunicipal compact creating the largest TDR program in New York. *See* Tom Morris, *The Pine Barrens: Preserving a Paradise, Officials Sign Historic Pact to Preserve Vast Forest, Aquifer,* NEWSDAY (Nassau and Suffolk), June 29, 1995, at A06.

[12] *See* Rick Brand and Tom Morris, *Peace, Finally, in Bitter Battle,* NEWSDAY (Nassau and Suffolk) June 29, 1995, at A29.

[13] *See* Rodgers v. Village of Tarrytown, 302 N.Y. 115, 121, 96 N.E.2d 731, 733 (1951).

[14] GEN CITY LAW s. 20(24) (McKinney 1989); TOWN LAW s. 262 (McKinney 1987); VILLAGE LAW s. 7-702 (McKinney 1996).

[15] These deed restrictions are the mechanism by which property in the sending district is protected from development; without them the TDR program cannot achieve its purpose.

[16] The Town of Eden established the first TDR program in Western New York in 1977. In thirteen years, the program resulted in only two TDR transfers. *See* Bob Buyer, *Eden Takes Steps to Protect Farmlands, Land Regulation Eyes Shape of Town in the Future,* BUFFALO NEWS, June 22, 1990, at local page.

[17] Most TDR programs have, in fact, been conceived as the result of a perceive crisis in what became the sending area. This crisis, plus the costs to the taxpayers of condemning land in the sending area to solve it, provide powerful reasons for the community to support the program.

[18] The City of New York=s Historical Landmark Preservation Program encourages the transfer of development rights from historical landmarks to receiving districts within the city. *See* Part D.2 *infra*.

[19] N.Y. GEN. CITY LAW s. 20-f (McKinney Supp. 1996); N.Y. TOWN LAW s. 261-a (McKinney Supp. 1996); N.Y. VILLAGE LAW s. 7-701 (McKinney 1996). For all statutes referenced in this Part, *see* Appendix IV.B.

[20] *See* N.Y. GEN CITY LAW s. 20-f, Legislative Declaration and Intent for L.1989, c. 40. (McKinney Supp. 1996).

[21] N.Y. GEN. CITY LAW s. 20-f(2); N.Y. TOWN LAW s. 261-a(2); N.Y. VILLAGE LAW s. 7-701(2).

[22] N.Y. GEN. CITY LAW s. 20-f(4); N.Y. TOWN LAW s. 261-a(4); N.Y. VILLAGE LAW s. 7-701(4) (emphasis added). A close reading of the amendments suggests that if a municipality cites the codification as the basis of authority for implementing a TDR program, that program must comport with the methodology outlined in the amendments. But by preserving other TDR authority, the statutes imply that a municipality may enact a TDR program which does not satisfy the requirements of the amendments. Such a program, presumably, would be subjected to traditional zoning analysis for compliance with a comprehensive plan.

[23] *See* N.Y. GEN CITY LAW s. 20-f, Legislative Declaration and Intent for L.1989, c. 40.

[24] *See* N.Y. GEN CITY LAW S. 20-f, Legislative Declaration and Intent for L.1989, c. 40.

[25] "The transfer of development rights, and the sending and receiving districts, shall be established in accordance with a comprehensive plan within the meaning of section two hundred sixty-three of this article." N.Y. TOWN LAW s. 261-a(2)(a). *See also,* N.Y. GEN. CITY LAW s. 20-f(2)(a); N.Y. VILLAGE LAW s. 7-701(2)(a). Normally, this requirement is not a very stringent one. Zoning amendments have been upheld as being in accord with a comprehensive plan even where no written document existed evincing such a plan. It is generally sufficient that changes in zoning are accomplished for a legitimate public purpose and not for the gain or detriment of individual property owners.

[26] Land use regulations should preserve access to sunlight for solar energy equipment.

[27] For example, a municipality may look upon a parcel of open land, and envision a golf course, a park, or a residential subdivision.

[28] "The sending district from which transfer of development rights may be authorized shall consist of natural, scenic, recreational, agricultural or open land or sites of special historical, cultural, aesthetic or economic values sought to be protected." N.Y. GEN. CITY LAW s. 20-f(2)(a); N.Y. TOWN LAW s. 261-a(2)(a); N.Y. VILLAGE LAW s. 7-701(2)(a).